No. 15414

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER HOLZ, also known as PETER HOLZ-MULLER,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization at Los Angeles, California and JOSEPH A. DUMMEL, Special Inquiry Officer, Immigration Service at Los Angeles,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Jurisdiction.

Appellant, plaintiff below, brought action in the District Court for review of an order of deportation outstanding against him, praying that such order be declared void and seeking to enjoin its enforcement [R. 3-15].[1] Judgment was entered in favor of appellees [R. 24-25]. The Court below had jurisdiction of appellant's action under

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[1]"R." refers to the Printed Transcript of Record. "Br." indicates references to Appellant's Opening Brief. Page references to the deportation hearing contained in Defendant's Exhibit "A" will be indicated by "Hg. ....." Exhibits attached to the deportation hearing will be referred to as "Hg. Ex. .....", followed in some cases by the page number of the exhibit.

the provisions of Section 10 of the Act of June 11, 1946 (Administrative Procedure Act), 60 Stat. 243, 5 U. S. C. A., Sec. 1009 (*Shaughnessy v. Pedreiro,* 349 U. S. 48 (1955)); and since its judgment was a final decision, jurisdiction is conferred upon this Court pursuant to 28 U. S. Code, Section 1291.

Statement of the Case.

Appellant is an alien, a native of Rumania [Hg. Ex. 2, p. 1], who last entered the United States during November, 1953 [Hg. 4; Hg. Ex. 2, p. 4]. On March 3, 1954 a Warrant of Arrest was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California, charging in substance that appellant was subject to deportation upon the following two grounds: (1) that at the time of his last entry he was excludable as an alien who was not in possession of a visa or other valid entry document; (2) that at the time of his last entry he was excludable as an alien who, during war or a national emergency, had departed from the United States to avoid service in the armed forces [Hg. Ex. 1].

On April 9, 1954 a deportation hearing was held; and on June 7, 1954 the Special Inquiry Officer who presided at the hearing rendered his decision, ordering that appellant be granted voluntary departure; but that if appellant failed to depart when and as required, the privilege of voluntary departure should be withdrawn without further notice or proceedings and that appellant be deported from the United States in the manner provided by law under

the charges contained in the warrant of arrest. This decision was sustained by the Board of Immigration Appeals [Deft. Ex. "A"].

On October 19, 1955 appellant filed a complaint in the Court below for review of the order of deportation outstanding against him, praying that such order be declared void and seeking to enjoin its enforcement [R. 3-15]. The District Court upheld the validity of the order of deportation and entered judgment in favor of appellees [R. 21-25]. From this judgment the present appeal was taken.

Issues Presented.

1. Is there reasonable, substantial, and probative evidence to support the order of deportation outstanding against appellant?

2. Were the deportation proceedings relating to appellant fair, in accordance with law, and in accord with appellant's constitutional rights?

Statutes Involved.

1. Section 241(a)(1) of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. A., Sec. 1251(a), provides:

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

2. Section 212(a) of the Immigration and Nationality Act, 66 Stat. 182, 8 U. S. C. A., Sec. 1182(a) provides in pertinent part:

> "(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * * * * *
>
> "(20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181 (e) of this title;
>
> * * * * * * * *
>
> "(22) * * * persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens who seek to reenter the United States as nonimmigrants;".

ARGUMENT.

I.

There Is Reasonable, Substantial, and Probative Evidence to Support the Order of Deportation Outstanding Against Appellant.

There was reasonable, substantial, and probative evidence adduced at appellant's deportation hearing to support the order of deportation now outstanding against him (Sec. 242(b)(4) of the Immigration and Nationality Act, 66 Stat. 209, 8 U. S. C. A., Sec. 1252(b)(4); see, *Ocon v. Del Guercio,* 237 F. 2d 177, 180 (C. A. 9, 1956); *Navarrette v. Landon,* 223 F. 2d 234, 236 (C. A. 9, 1955), fn. 2).

Appellant was born in Rumania on April 30, 1931 [Hg. Ex. 2, p. 1]. He was first admitted to the United States on May 27, 1950 for permanent residence [Hg. 3-4, 12-13; Hg. Ex. 2, p. 2; Hg. Ex. 3]. During August, 1950 appellant registered for the draft [Hg. 17, 22]; and on December 18, 1950 appellant was issued a Declaration of Intention to become a citizen of the United States by the Clerk of the United States District Court for the Southern District of California [Hg. 21, Hg. Ex. 5].

During March, 1952 appellant received a notice from his local draft board to report for induction [Hg. 4; Hg. Ex. 2, p. 3]. He appeared at the draft board and demanded that he be made a citizen before being inducted into military service [Hg. 13-14, 23]. At about the same time appellant sought at the Federal Building, Los Angeles, California, to return the Declaration of Intention which had been issued to him on December 18, 1950 [Hg. 23]. Not succeeding, he mailed this Declaration of Intention to the Immigration and Naturalization Service, Washington, D. C., with a letter which stated in

part: "I have a legacy in Germany and I would not be able to take out the legacy of Germany, if I am an American Citizen" [Hg. 21-23, Hg. Ex. 5].

On April 2, 1952 appellant departed from the United States and went to Mexico after, according to his testimony, he had been approached by a member of the F.B.I. who told him that he would be arersted the next day [Hg. Ex. 2, p. 3]. Appellant remained in Mexico continuously from April 2, 1952 until sometime during October, 1953 [Hg. 4-5; Hg. Ex. 2, pp. 2-4], when he returned to the United States and was admitted upon the presentation of his Alien Registration Card [Hg. 5-6; Hg. Ex. 2, p. 4]. On October 19, 1953, appellant was issued a visa by the Mexican Consul, Los Angeles, California, valid for six months, whereupon he again went to Mexico, remaining about two weeks [Hg. 5-6; Hg. Ex. 2, p. 4]. Appellant last entered the United States during November, 1953 upon the presentation of his Alien Registration Card [Hg. 4; Hg. Ex. 2, p. 4]. At the time of his last entry, appellant intended to reside in the United States permanently [Hg. 5; Hg. Ex. 2, p. 4]. He did not have a visa or any other document for entry except his Alien Registration Card [Hg. 5; Hg. Ex. 2, p. 4].

An alien has no right to enter the United States without a visa or other valid entry document (Sec. 211 of the Immigration and Nationality Act, 66 Stat. 181, 8 U. S. C. A., Sec. 1181; *United States ex rel. Polymeris et al. v. Trudell,* 284 U. S. 279 (1932); *Taranto v. Haff,* 88 F. 2d 85 (C. A. 9, 1937); *United States ex rel. Santarelli v. Hughes,* 116 F. 2d 613 (C. A. 3, 1940); *Haff v. Tom Tang Shee,* 63 F. 2d 191 (C. A. 9, 1933)). As this Court in *Taranto v. Haff, supra,* declared (p. 85):

> ". . . A returning alien from abroad must present an immigration visa or a return permit and

'must show not only that they ought to be admitted, but that the United States by the only voice authorized to express its will has said so' (citation)".

It is clear that when appellant last entered the United States during November, 1953, he was without a visa or other valid entry document. The waiver of visa requirements on behalf of an alien previously lawfully admitted to the United States for permanent residence who departs temporarily to Mexico is limited to those who return from such absence within six months (8 C. F. R. 211.2(c)(1)). Appellant was absent approximately eighteen months; consequently, his Alien Registration Card was invalid as an entry document. The first charge, therefore, is unequivocally established, and is in itself sufficient to support the order of deportation outstanding against appellant.

There is also reasonable, substantial, and probative evidence to support the decision of the Special Inquiry Officer that appellant departed from the United States for the purpose of avoiding service in the armed forces. On March 2, 1954, when being interviewed by the Immigration and Naturalization Service, appellant answered questions as follows [Hg. Ex. 2, p. 3]:

"Q. Then when you departed from the United States on April 2, 1952 at El Paso, Texas did you depart for the purpose of avoiding service in the Armed Forces of the United States? A. Well, yes, I did.

Q. Did you have any other reason for departing from the United States on April 2, 1952? A. No, I didn't know anyone in Mexico or have any job, and I didn't have any other reason to go there. I was scared, that's all."

At the deportation hearing appellant denied that he departed from the United States to avoid military service [Hg. 13] and testified that he wanted to be made a citizen before entering military service for fear of what would happen to him if he were captured without being a citizen [Hg. 13-14, 17]. However, his claimed desire to become a citizen before induction is contradicted by the return of his Declaration of Intention after being ordered to report for induction with remarks indicating that he did not want American citizenship [Hg. 21-23; Hg. Ex. 5]. Moreover, appellant departed from the United States during the time hostilities in Korea were taking place, and remained until approximately three months after hostilities had ended;[2] therefore, it is reasonable to infer that he departed in order to avoid service in Korea.

II.

The Deportation Proceedings Relating to Appellant Were Fair, in Accordance With Law, and Did Not Violate Any of Appellant's Constitutional Rights.

Appellant apparently seeks to attack the order of deportation outstanding against him by urging that he "was misled into a bad decision by the action of the local (draft) board so as to be deprived of an intelligent choice and so was deprived of due process" (Br. 4). Appellant then concludes: "The Immigration Service officer hearing, while perfectly fair as far as he went, declined to go into this question. He restricted himself to the technical phases of the illegal entry of November, 1953" (Br. 5).

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[2]Hostilities in the Korean War lasted from June 25, 1950 to July 27, 1953 (World Almanac, 1954, p. 48).

The record discloses, however, that due consideration was given during appellant's deportation proceedings of the alleged events occurring before the draft board. Appellant was permitted to testify fully concerning draft board proceedings; and both the Special Inquiry Officer and the Board of Immigration Appeals in their decisions, discussed his testimony and its effect [see pp. 1-2, 3 of Decision of Special Inquiry Officer dated June 7, 1954, and pp. 4-6 of decision of Board of Immigration Appeals, dated November 29, 1954, contained in Deft. Ex. "A"].

Moreover, the record does not support appellant's contention that he was misled or deprived of an intelligent choice. The position of appellant, while not so stated by him, seems to be analogous to the assertion of the defense of entrapment in criminal cases. It is well settled that entrapment exists only when government agents induce and originate the criminal intent of a defendant (*Sorrels v. United States,* 287 U. S. 435 (1932); *Grimm v. United States,* 156 U. S. 604, 609-611 (1895); *United States v. Lemons,* 200 F. 2d 396, 397 (C. A. 7, 1952); *United States v. Lindenfeld,* 142 F. 2d 829 (C. C. A. 2, 1944), cert. den. 323 U. S. 761; *Ratigan v. United States,* 88 F. 2d 919, 922 (C. C. A. 9, 1937), cert. den. 301 U. S. 705; *Fiunkin v. United States,* 265 Fed. 1 (C. C. A. 9, 1920)). The intent of appellant to leave the United States to avoid military service originated solely with him.

In addition, it appears that appellant did not desire advice or information. Before his departure, he did not tell anyone where he was going [Hg. 17]; although his parents and sister were in the United States [Hg. 8]; and their views could have been obtained. During the period of approximately 18 months that appellant remained in Mexico he sought no advice [Hg. 24]; even

though he corresponded with his parents in the United States during this time [Hg. 18]. The evidence shows that appellant, rather than being misled, intelligently, deliberately, and intentionally departed from and remained outside of the United States to avoid service in the armed forces.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court in favor of appellees, denying the relief prayed for in appellant's complaint, should be affirmed.

Respectfully submitted,

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